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No. 766

In the Supreme Court of the United States

OCTOBER TERM, 1935

SAMUEL ZIMMERN ET AL., PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statute and rules involved	2
Statement	3
Summary of argument	8
Argument:	
Introductory	9
I. Mrs. Leila Zimmern's so-called petition for rehearing did not enlarge the time for appealing from the decree of March 3, 1934	11
A. The petition for rehearing is not in the record	11
B. The petition cannot be supplied by presumption from other parts of the record	12
C. The petition was not made a part of the record by proceedings in the Circuit Court of Appeals	15
D. The petition cannot now be made a part of the record by a nunc pro tunc order	17
E. Even if Mrs. Zimmern's petition for rehearing were in the record, it would not have enlarged the appeal time for Mrs. Zimmern, much less for any of the other petitioners	19
II. The amended petition for rehearing filed by Samuel Zimmern did not revive the already expired right to appeal from the decree of March 3, 1934	22
III. The addition made to the final decree by the District Court's order of August 13, 1934, did not revive the already expired right to appeal from the final decree itself	23
Conclusion	33
Appendix	34

CITATIONS

Cases:	
Alabama Coal and Navigation Co. v. *State*, 54 Ala. 36	29
Albatross, The, 19 F. (2d) 141	28
Allis-Chalmers Co. v. *United States*, 162 Fed. 679	28
Aspen Mining & Smelting Co. v. *Billings*, 150 U. S. 31	11, 14
Barton v. *Petit*, 7 Cranch 288	18
Beavan v. *Countess of Mornington*, 8 H. L. C. 525; 11 Eng. Rep. 534	28

Cases—Continued. Page

Besser v. *Alpena Circuit Judge*, 155 Mich. 631, 119 N. W. 902 29
Better Packages, Inc. v. *L. Link & Co.*, 74 F. (2d) 679, cert. den., 295 U. S. 751 ..... 9, 28, 29
Billson v. *Lardner*, 67 Minn. 35 30
Blossom v. *Railroad Company*, 3 Wall. 196 27
Brady v. *Bernard and Kittinger*, 247 U. S. 595 23
Brockett v. *Brockett*, 2 How. 238 ..... 11, 19
Chenoweth v. *Chenoweth*, 64 Ind. App. 260 29
Chicago, G. W. R. R. Co. v. *Basham*, 249 U. S. 164 19
Chicago, M. & St. P. Ry. Co. v. *Leverentz*, 19 F. (2d) 915, cert. den., 275 U. S. 543 23
Chicago v. *Bigelow*, 131 U. S. Appendix, xciii 18
Clark v. *Williard*, 294 U. S. 211 22
Conboy v. *First National Bank*, 203 U. S. 141 ..... 9, 23
Cody v. *Cody*, 47 Utah, 456 29
Crowell et al. v. *United States*, 281 Fed. 835 28
Dang Nam v. *Bryan*, 78 F. (2d) 720 12
Evans v. *Stettinisch*, 149 U. S. 605 17
Exporters of Manufacturers' Products v. *Butterworth-Judson Co.*, 258 U. S. 365 12
Fidelity Philadelphia Trust Co. v. *Brown*, 181 Minn. 466 29
Fletcher v. *Peck*, 6 Cranch 87 18
Fowler v. *Hamill*, 139 U. S. 549 28
Fulton Inv. Co. v. *Dorsey*, 220 Fed. 298 28
George v. *Victor Talking Machine Co.*, 293 U. S. 377 12
Giant Powder Co. v. *Calif.-Vigorit Powder Co.*, 5 Fed. 197 21
Governor Ames, The, 187 Fed. 40 21
Graffam v. *Burgess*, 117 U. S. 180 27
Hall v. *Brown*, 139 App. Div. 388 29
Hall v. *Read*, 28 Tex. Civ. App. 18 30
Hartford Accident & Indemnity Co. v. *Bunn*, 285 U. S. 169 22
Hayes v. *Silver Creek Co.*, 136 Cal. 238 30
Henry v. *Boulter*, 26 Tex. Civ. App. 387 30
Hill v. *Chicago & Evanston Railroad Co.*, 140 U. S. 52 28
Hudgins v. *Kemp*, 18 How. 530 ..... 8, 17, 18
Hyde v. *Shine*, 199 U. S. 62 16
Johnson v. *Foreman*, 24 Ind. App. 93 30
Kingman & Co. v. *Western Mfg. Co.*, 170 U. S. 675 ..... 7, 11, 12
Klein v. *Southern Pacific Co.*, 140 Fed. 213 18
Larkin Packer Co. v. *Hinderliter Tool Co.*, 60 F. (2d) 491 ..... 8, 19, 28
Lindheimer v. *Illinois Bell Telephone Co.*, 292 U. S. 151 25
Long v. *Maxwell*, 59 Fed. 948 ..... 19, 27, 28
Luckenbach Steamship Co. v. *United States*, 272 U. S. 533 7
McIntosh v. *United States; Gilliam* v. *United States*, 70 F. (2d) 507; cert. den., 293 U. S. 586; pet. for rehearing den., 293 U. S. 631 23
Merchant and Miners Transp. Co. v. *Robinson etc. T. & T. Co.*, 194 Fed. 361 21

Cases—Continued.

	Page
Missouri, Kansas and Texas R. R. Co. v. *Dinsmore*, 108 U. S. 30	18
Mootry v. *Grayson*, 104 Fed. 613	28
Morse v. *United States*, 270 U. S. 151	11, 19
Northwestern Public Service Co. v. *Pfeifer*, 36 F. (2d) 5	23
Partridge v. *Wooton*, 63 Tex. Civ. App. 280	30
Potter, In the matter of, 141 Cal. 350	29
Prescott & A. C. Ry. Co. v. *Atchison, T. & S. F. R. Co. et al.*, 84 Fed. 213	28
Public Schools v. *Walker*, 9 Wall. 603	21
Sage et al. v. *Central R. R. Co.*, 93 U. S. 412	22
Sage v. *Railroad Co.*, 96 U. S. 712	28
Savings and Loan Society v. *Horton*, 63 Cal. 310	29
Schulze v. *Oregon R. R. and Nav. Co.*, 41 Wash. 614	29
Spencer v. *Troutt*, 133 Cal. 605	30
Stewart v. *Wyoming Ranche Co.*, 128 U. S. 383	17
Stitt v. *Huidekopher*, 131 U. S. Appendix cxviii	18
Stradford v. *Wagner*, 64 F. (2d) 749	9, 28, 31
Texas and Pacific Railway Co. v. *Murphy*, 111 U. S. 488	7, 11, 13
Torgovnick, in re, 49 F. (2d) 211	12
Union Guardian Trust Co. v. *Jastromb*, 47 F. (2d) 689	26
United States v. *Adams*, 9 Wall. 661	18
United States v. *East*, 80 F. (2d) 134	23
United States v. *Gomez*, 1 Wall. 690	26
United States v. *Nordbye*, 75 F. (2d) 744	28
Vincent v. *Vincent*, 3 Mackay (14 Dist. of Col.) 320	30
Washington, The, 16 F. (2d) 206	28
Woodward v. *Brown*, 13 Pet. 1	18
Statutes:	
Act of Feb. 13, 1925, Sec. 8 (c), c. 229, 43 Stat. 940 (U. S. C., Title 28, Sec. 230)	2
Code of Alabama, Sec. 7433	27
Judicial Code, Sec. 240 (a)	2
Appendix:	
Affidavit of Honorable Robert T. Ervin	35
Affidavit of Virgil C. Griffin	41
Federal Equity Rule 69	34
Federal Equity Rule 72	34
Rules of the U. S. District Court, Southern District of Alabama:	
General Rule 12	34
General Rule 30	35

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OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Alabama, which deals only with the merits and not with the question of jurisdiction (R. 51–53) was rendered March 1, 1934, and has not been reported. The opinion of the United States Circuit Court of Appeals for the Fifth Circuit, which deals only with the question of jurisdiction (R. 79–80) was rendered November 14, 1935, and is reported in 79 F. (2d) 703. The opinion of the same Circuit Court of Appeals on the

denial of the motion for rehearing (R. 89–93) was rendered January 16, 1936, and has not yet been reported.

JURISDICTION

The decree of the Circuit Court of Appeals was entered November 14, 1935 (R. 80–81). Petitions for rehearing (R. 81–87) and motion to revoke dismissal (R. 87–88) were filed December 3, 1935 and were denied January 16, 1936 (R. 93).

Petition for writ of certiorari was filed February 20, 1936 (R. 95) and was granted March 2, 1936 (R. 95).

The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the petitioners' appeals to the Circuit Court of Appeals were taken within the period allowed by Section 8 (c) of the Act of February 13, 1925.

STATUTE AND RULES INVOLVED

The only statute involved is Section 8 (c) of the Act of February 13, 1925, c. 229, 43 Stat. 940 (U. S. C., Title 28, Sec. 230), which provides as follows:

> No writ of error or appeal intended to bring any judgment or decree before a circuit court of appeals for review shall be allowed unless application therefor be duly

made within three months after the entry of such judgment or decree.

The Federal equity and local District Court rules involved will be found in the Appendix.

STATEMENT

On October 15, 1929, the United States filed in the United States District Court for the Southern District of Alabama a bill in equity against Samuel Zimmern, his wife and their three children (R. 2–12). The bill, as subsequently amended (R. 12–13), alleged that Samuel Zimmern owed the United States $53,236.51 on account of income taxes for the year 1920 (R. 4; cf. R. 26–27); that, at a time when the taxes were an existing liability, and without receiving any consideration, Samuel Zimmern had first conveyed to his wife his interest in a dwelling house and lot at 1116 Government Street, Mobile, Alabama (R. 5–6, 12) and had then joined with his wife in conveying to their children their interest in land on Royal Street in the same city (R. 6–8, 12–13); and that these conveyances left Samuel Zimmern without assets from which this tax liability can be collected (R. 6, 8). The bill prayed that these two conveyances should be declared fraudulent and set aside, and that the "property transferred *by the defendant*[1] [Samuel Zim-

[1] It is important to note that the bill did not pray that the interest transferred by Samuel Zimmern's wife, Leila, be charged with a trust. From the first it was clear that the United States was not trying to reach Leila's dower interest in the lands in controversy.

mern] *to his wife* and to his children as described in this bill be charged with a trust in favor of the complainant in the sum of $53,236.51."

After an answer had been filed [2] (R. 13–15) and amended (R. 15–20), and after evidence had been taken (R. 23–51), the District Judge rendered an opinion (R. 51–53) holding that the conveyances were fraudulent and should be set aside and that "the prayer of the bill should be granted" [3] (R. 53).

On March 3, 1934, the District Court made what the Court itself styled a "Final Decree." (R. 54–57.) The decree consisted of 8 numbered paragraphs which respectively adjudged that (1) Samuel Zimmern is indebted to the United States for certain named sums; (2) Samuel Zimmern's conveyance of the Government Street property is set aside; (3) the joint conveyance by Samuel Zimmern and his wife of the Royal Street property is set aside; (4) "the two above described parcels of land * * * be sold by the United States Marshal" at public sale; (5) out of the proceeds of the sale of the Government Street property $2,000 be

[2] The petitioners did not challenge the existence of the tax liability (R. 14, paragraph 3), but contended that the conveyances in question should not be deemed fraudulent because they were made for consideration and because, even after the conveyances, Samuel Zimmern had assets left sufficient to satisfy his existing obligation to the United States (R. 13–20).

[3] Nowhere in the petitioner's answer, or the evidence, or the District Court's opinion, is reference made to the dower interest of Mrs. Leila Zimmern.

paid to Leila Zimmern in lieu of homestead exemptions; (6) subject to the $2,000 homestead claim, a trust be declared on the proceeds in favor of the United States for the amount of its tax claim; (7) in the event the proceeds are insufficient to meet the tax claim, execution issue against Samuel Zimmern's other property; and (8) in the event Samuel Zimmern's wife and children fail to note in the county record book that their deeds have been cancelled, the Clerk of the District Court shall so note.

The District Court on May 11, 1934, extended the November Term, 1934, which otherwise would have expired on May 28, 1934, to ninety days from that date, that is, to August 26, 1934 (R. 57). On August 11, 1934, Samuel Zimmern, alone of the petitioners, filed a paper which he designated as an "Amended Petition of Defendant for Rehearing", and which represents that the District Court decided contrary to the evidence and without awaiting the testimony of a material witness (R. 58–60). This petition did not represent that error was committed with respect to Mrs. Leila Zimmern's dower interest.

On August 13, 1934, the District Court made an "Order Amending Final Decree" (R. 60–61). This order did not repeat the eight numbered paragraphs of the original decree but merely added a ninth paragraph decreeing that the lands ordered

to be sold by that earlier decree "be sold subject to any dower rights of the respondent Leila Zimmern" (R. 61).

Petitions for appeal from the decree and "the amendment thereof" were filed November 10, 1934, by Samuel Zimmern (R. 61–62), his wife, Leila Zimmern (R. 65), and two of their children, Samuel Joseph Zimmern, Jr., and Janice Zimmern (R. 67–68). Berenice L. Levinsohn, the other child of Samuel and Leila Zimmern, who had been joined as a respondent in the District Court, refused to join in the appeal (R. 68). The District Court granted the present petitioners (who had been respondents in the District Court) a severance against Berenice L. Levinsohn and the right to appeal (R. 72–73). Each of them filed an assignment of errors relating solely to the original decree of March 3, 1934 (R. 62–64; 65–67; 68–70).

In the Circuit Court of Appeals the United States moved to dismiss the appeals on the ground that, the appeals not having been applied for in time, to wit, within three months of March 3, 1934, the court had no jurisdiction (R. 74–77). On November 14, 1935, the Circuit Court of Appeals rendered an opinion holding that it was without jurisdiction of the appeals (R. 79–80), and therefore dismissed them (R. 80–81). All the appellants filed a petition for rehearing (R. 81–87) and the appellant Leila Zimmern, in addition, moved to revoke the dismissal (R. 87–88). Attached to

this petition for rehearing in the Circuit Court of Appeals was a copy of a document (R. 84–87) not theretofore in the record, but alleged to be itself an earlier "Petition for Rehearing" that had been "*presented* to the Judge" of the *District Court* prior to May 11, 1934 (R. 83). The appellants urged that the time for appealing from the District Court did not commence to run until this document was acted upon, which was alleged to have occurred on August 13, 1934 (R. 82–83).

The Circuit Court of Appeals on January 16, 1936, rendered an opinion (R. 89–93) and entered an order (R. 93) denying the petition for rehearing and the motion to revoke dismissal.[4]

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[4] Read with extreme literalness, the order of the Circuit Court of Appeals merely denies "the petition for rehearing." But it appears from its opinion that the court treated Mrs. Leila Zimmern's so-called "motion to revoke dismissal" as the equivalent of a petition for rehearing, and denied it (R. 89, third paragraph of the opinion; R. 90; R. 91). This construction of the court's action corresponds with the construction by the petitioners in their motion for an order staying the mandate where they state that the Circuit Court of Appeals has denied both "petitions' (sic) for rehearing." (R. 93.)

The point is in any event immaterial. The decree of November 14, 1935, is the only order here under review (Petition for Writ of Certiorari, p. 8, II, 1), or as to which review could be had. Errors cannot be assigned to, or review had of, an order denying a motion for a rehearing because the disposition of such motion is discretionary. *Luckenbach Steamship Co.* v. *United States*, 272 U. S. 533, 535; *Kingman & Co.* v. *Western Mfg. Co.*, 170 U. S. 675, 680; *Texas and Pacific Railway Co.* v. *Murphy*, 111 U. S. 488, 489.

A petition for certiorari seeking a review only of the decree of November 14, 1935 (Petition for Writ of Certiorari, p. 8) was filed on February 20, 1936, and was granted on March 2, 1936 (R. 95).

SUMMARY OF ARGUMENT

The only question in this case is whether the Circuit Court of Appeals erred in adjudging that the applications for appeal to it of a decree entered March 3, 1934, by the District Court were not timely taken. To show that the appeals were timely taken, the petitioners rely upon a so-called petition for rehearing of Mrs. Leila Zimmern, a so-called amended petition for rehearing filed by Mr. Samuel Zimmern, and an addition to the decree made by the District Court's order of August 13, 1934.

Mrs. Leila Zimmern's petition for rehearing cannot be considered because it is not in the record; and its existence or timely filing cannot be presumed from what is in the record or from an affidavit offered in the Circuit Court of Appeals after the appeal had been dismissed. *Hudgins* v. *Kemp,* 18 How. 530, 534–535. Even if the document were in the record, it is not the sort of petition for rehearing which extends the time for appeal, but is only an application for a clarifying amendment as to a point not in issue between the parties. *Larkin Packer Co.* v. *Hinderliter Tool Co.,* 60 F. (2d) 491 (C. C. A. 10th).

Mr. Samuel Zimmern's amended petition for rehearing did not enlarge the appeal time because when it was filed "the right of appeal had then been lost and appellant could not reinvest himself with that right by filing a petition for rehearing." *Conboy* v. *First National Bank,* 203 U. S. 141, 145.

Nor was the time for appealing from the decree of March 3, 1934, revived by the amendment made on August 13, 1934, after the right to appeal from the decree had expired. This amendment, made at the petitioners' request, to benefit them, and to clarify a formal slip which could, at their option, have been remedied in ways other than by amendment, did not create a new right of appeal. *Better Packages, Inc.* v. *L. Link & Co.,* 74 F. (2d) 679, 680–681 (C. C. A. 2d); *Stradford* v. *Wagner,* 64 F. (2d) 749, 751 (C. C. A. 10th).

ARGUMENT

Introductory

The only question presented in this case is whether the Circuit Court of Appeals erred in adjudging that the applications for appeal to it from the District Court were not timely made.

The final decree of the District Court was entered on March 3, 1934 (R. 54–57). Unless some significant proceedings occurred thereafter in the District Court, an application for an appeal had to "be duly made within three months after the entry of such

* * * decree," that is, by June 3, 1934. Section 8 (c) of the Act of February 13, 1925, c. 229, 43 Stat. 940 (U. S. C., Title 28, Sec. 230). This principle is, of course, admitted by the petitioners, but they claim that three significant proceedings did occur in the District Court after March 3, 1934, and that each of these proceedings enlarged the time for appealing to the Circuit Court of Appeals.

First, the petitioners contend that within three months after the original decree of the District Court one of them, Mrs. Leila Zimmern, filed a petition for rehearing in the District Court; that such filing suspended both for her (Petition for Certiorari, p. 12, IV, 3; p. 12, V, A) and for all other parties (Petition for Certiorari, p. 12, IV, 2; p. 13, V, B) the time for taking an appeal; and that the time within which the proceeding to review might be initiated began to run from the date of the denial of such petition. Second, they contend[5] that Samuel Zimmern's petition for rehearing, although filed more than three months after the original decree of the District Court, gave both to him and to all other parties a new right of

[5] It is not clear that the petitioners can make this second contention. They did not specifically urge it either in the Circuit Court of Appeals (R. 77–79; 81–87; 87–88) or in their Petition for Certiorari to this Court (Petition, p. 12, "Specification of Errors"). However, since the point was in the record in the lower court (R. 75, No. 6), was considered by that court (R. 79–80), and may be embraced in the general specifications of error by the petitioner (Petition for Certiorari, p. 12, IV, 1), this brief considers the contention.

appeal, and that the time within which the proceeding to review might be initiated began to run from the denial of such petition. Third, they contend that the addition made to the final decree by the District Court's order of August 13, 1934, had the effect of reviving the right (which had theretofore expired) to appeal from the final decree itself.

The Government submits that none of these contentions is valid, and, moreover, that the first contention cannot be considered since it is based on matter dehors the record.

I

Mrs. Leila Zimmern's So-Called Petition for Rehearing Did Not Enlarge the Time for Appealing From the Decree of March 3, 1934

The petitioners' main reliance is upon Mrs. Zimmern's so-called petition for rehearing. They contend that this document calls for an application of the well-settled rule [6] that where a petition for rehearing is seasonably filed, the time for an appeal does not begin to run until after the petition is denied.

A. THE PETITION FOR REHEARING IS NOT IN THE RECORD

To this contention the Government's first answer is that since the document does not appear in the

[6] *Brockett* v. *Brockett*, 2 How. 238; *Texas and Pacific Ry. Co.* v. *Murphy*, 111 U. S. 488; *Aspen Mining & S. Co.* v. *Billings*, 150 U. S. 31; *Kingman & Co.* v. *Western Mfg. Co.*, 170 U. S. 675; *Morse* v. *United States*, 270 U. S. 151.

record it cannot be referred to as a means of sustaining the jurisdiction of the Circuit Court of Appeals. That court has jurisdiction of a case only if the record affirmatively shows that an appeal was taken to it in the time allowed by law. *George* v. *Victor Talking Machine Co.*, 293 U. S. 377, 379; *Exporters of Manufacturers' Products* v. *Butterworth-Judson Co.*, 258 U. S. 365, 369; *Dang Nam* v. *Bryan*, 78 F. (2d) 720 (C. C. A. 9th); *In re Torgovnick*, 49 F. (2d) 211, 212 (C. C. A. 2d). And in this case the record does not show that within three months after the decree was entered an appeal was taken or a petition for rehearing was filed by Mrs. Leila Zimmern or anyone else. Indeed the petitioners in their own praecipe for transcript of record (R. 1), as amended with their consent (R. 2) did not request the clerk to include any petition by Mrs. Leila Zimmern.

B. THE PETITION CANNOT BE SUPPLIED BY PRESUMPTION FROM OTHER PARTS OF THE RECORD.

But the petitioners suggest that though the petition for rehearing is not in the record, this Court should presume that the petition did exist and was seasonably filed. For this proposition they cite [7]

[7] The petitioners also cite *Kingman* v. *Western Mfg. Co.*, 170 U. S. 675, 678. There the motion for a new trial was in the record and was seasonably filed. The questions were whether the trial judge had given counsel leave to file, and whether the motion was regularly and properly made. It was said that "no leave to file it was required" and "it must be presumed that it [the motion] was regularly and properly made." (170 U. S. at 678.)

Texas and Pacific Ry. Co. v. *Murphy,* 111 U. S. 488, 489. There a petition for rehearing actually appeared in the record, but the particular date on which it was filed was inadvertently omitted. This Court, after examining other corroborative parts of the record, presumed that the petition was timely filed.

That presumption relating only to the date of a document admittedly in the record has no application here; and we submit that a new presumption as to the very existence of a document should not be invented to cover the facts of this case. Indeed we believe that there are no facts in this record to which such a presumption, if it were invented, could properly be applied.

The petitioners, however, argue that there are facts upon which a presumption could be based, and they specifically refer to the District Court's Order Extending Term of Court (R. 57); the District Court's Order Amending Final Decree (R. 60–61); and the District Court's Order Allowing Appeal (R. 72–73). None of these seems to the Government adequate to support a presumption that Mrs. Zimmern's petition existed and was filed on time.

The Order Extending Term of Court was filed May 11, 1934 (R. 57). It recites that "*for good reason shown* it will be necessary to modify or amend said decree" and it then extends the term for ninety days "in which time all matters and orders

in connection with this cause and the amendments of the decree may be entered." We find it difficult to see how this order furnishes a basis for presuming that a petition for rehearing had been already filed. The recital that "good reason" has been shown seems to indicate that it was shown orally. (See Affidavit of Honorable Robert T. Ervin, Appendix, pp. 34–42, and discussion, pp. 17–18 *infra*) and not by motion, for if a motion had been made, reference would undoubtedly have been made to it in accordance with the customary practice. (Cf. R. 75.) Furthermore, the order is more nearly repugnant to, than consistent with, the idea that a petition for rehearing had already been filed. For, if a petition for rehearing had already been filed, the parties would have been "bound to follow the petition thus pending to the next term" and an extension of the term would have been unnecessary. *Aspen Mining and Smelting Co.* v. *Billings*, 150 U. S. 31, 36.

The District Court's Order Amending the Final Decree (R. 60–61), filed August 13, 1934, is no more helpful in laying a basis for any presumption of prompt filing of Mrs. Leila Zimmern's petition. Inasmuch as this order was not entered until August 13, 1934, a mere recital that a petition for rehearing had theretofore been filed does not justify an inference that the petition was filed as early as June 3, 1934, the date on which the time for ap-

pealing from the decree of March 3, 1934, would ordinarily expire.[8]

The third part of the record to which the petitioners point as laying a foundation for the presumption they invoke is the Order Allowing Appeal (R. 72–73) filed December 3, 1934. This order does not refer to any petition for rehearing. It is cited apparently on the theory that the District Judge would not have allowed an appeal unless he knew that the appeal was timely taken. To this the short answer is that the books are too full of cases where trial judges have erroneously allowed appeals, for this Court to assume that the allowance of an appeal, without anything more, justifies an inference that the application to the trial judge was timely made.

C. THE PETITION WAS NOT MADE A PART OF THE RECORD BY PROCEEDINGS IN THE CIRCUIT COURT OF APPEALS

If Mrs. Leila Zimmern's petition for rehearing cannot be brought into the record by presumption, it is even clearer that it cannot be brought there by

[8] The terms of this Order Amending the Final Decree are so ambiguous that they lead to conflicting inferences. The order consistently refers to a motion of respondents for rehearing. The use of the singular in describing the "motion" implies that the only document before the court was Samuel Zimmern's Amended Petition for Rehearing (R. 58–60). On the other hand, the use of the plural in describing the "respondents" implies that there was before the court a document in addition to the "Amended Petition" submitted by Samuel Zimmern alone.

any proceedings which occurred in the Circuit Court of Appeals.

In that court, after the appeal had been dismissed (R. 80–81), all the petitioners joined in a petition for rehearing (R. 81–87), and, in addition, Mrs. Zimmern made a motion to revoke dismissal[9] (R. 87–88). Attached to the joint petition for rehearing in the Circuit Court of Appeals, and incorporated in both documents by reference, was Mrs. Leila Zimmern's so-called petition for rehearing in the District Court (R. 84–87). This petition for rehearing and what was attached thereto cannot be considered in this Court, not only because they are subsequent to, and not affected by, the decree of November 14, 1935, the only decree here under review (Petition for Certiorari, p. 8, II, 1), but also because affidavits attached to a petition for rehearing in a lower court are not a part of the

[9] In her motion to revoke dismissal, Mrs. Zimmern also suggested that the Circuit Court of Appeals allow her time to take steps to request "the lower [i. e., District] Court to correct its record by making her petition for a rehearing in said Court a part of the record and then have the corrected record brought up by a writ of certiorari" (R. 88). If this informal request may be considered as the equivalent of a formal suggestion of diminution of the record and motion for certiorari, and if it be assumed that the motion was denied (R. 92, lines 3–5), nonetheless this denial is not reviewable, both because in the petition for certiorari it was not specified as error and because it was a discretionary, non-reviewable ruling. *Hyde* v. *Shine*, 199 U. S. 62, 85. See footnote 4 on page 7, *supra*. Moreover, it is obvious that the denial of the motion did not make the subject-matter of the motion part of this record.

record. *Hudgins* v. *Kemp.*, 18 How. 530, 534–535; *Stewart* v. *Wyoming Ranche Co.*, 128 U. S. 383, 390; *Evans* v. *Stettnisch*, 149 U. S. 605, 607.

D. THE PETITION CANNOT NOW BE MADE A PART OF THE RECORD BY A NUNC PRO TUNC ORDER.

There is no suggestion by the petitioners that this Court should now either amend the record or stay proceedings to allow some other court to amend the record. But if such a suggestion had been or were to be made it could not succeed.

The reason that the so-called petition for rehearing is not in the record is not because of misprision of the clerk or oversight in preparing the praecipe for transcript of the record. It is not in the record because it was not submitted to the District Judge and was not filed with the Clerk of the District Court. At any rate, the Judge of the District Court does not recall having seen such a document, though he does recall an oral discussion of the matters alleged to be covered by that document (affidavit of the Honorable Robert T. Ervin, Appendix, pp. 34–42); and the Clerk of the District Court certifies that no such document was ever filed in the cause (affidavit of Virgil C. Griffin, Appendi, pp. 41–42). In view of these statements we suppose that the affidavit of Harry T. Smith (R. 83–86) must be narrowly construed, and that when the affiant stated that he "*presented* to the Judge * * * a petition for rehearing in behalf of Mrs. Leila Zimmern in said cause prior to the order of May 11, 1934," he meant nothing more than that

he informally discussed with the Judge a proposed change in the decree, but did not file a petition for rehearing. This narrow construction seems supported by Mrs. Leila Zimmern's Motion to Revoke Dismissal (R. 87–88) in which she herself assumes that the petition never was a part of the District Court's record (R. 88, lines 9–10).

If the petition was merely orally discussed before the time for appeal expired, it cannot thereafter be filed for the purpose of creating a new right of appeal. Cf. *Klein* v. *Southern Pacific Co.,* 140 Fed. 213, 215–216 (C. C. D. Ore.). The situation is unlike the cases in which it was held that where a paper had been seen, entertained, and acted upon by the lower court at the appropriate time, but had been lost or not included in the record through the misprision of the clerk, or through inadvertence, it could be supplied either by an application to the trial court, *Chicago* v. *Bigelow,* 131 U. S. App. xciii; or by an application to the appellate court, *Woodward* v. *Brown,* 13 Pet. 1, 2; *Stitt* v. *Huidekopher,* 131 U. S. Appendix cxvii; see *Hudgins* v. *Kemp,* 18 How. 530, 534; or by a suggestion to the appellate court of a diminution of the record and motion for a writ of certiorari, *Missouri, Kansas & Texas R. R. Co.* v. *Dinsmore,* 108 U. S. 30, 31; *United States* v. *Adams,* 9 Wall. 661; cf. Rule 17 of the Rules of the Supreme Court of the United States; or by stipulation and consent of the parties, *Fletcher* v. *Peck,* 6 Cranch 87, 127; see *Hudgins* v. *Kemp,* 18 How. 530, 534.

E. EVEN IF MRS. ZIMMERN'S PETITION FOR REHEARING WERE IN THE RECORD, IT WOULD NOT HAVE ENLARGED THE APPEAL TIME FOR MRS. ZIMMERN, MUCH LESS FOR ANY OF THE OTHER PETITIONERS

Even if Mrs. Zimmern's so-called Petition for Rehearing were in the record, it would not have tolled the appeal statute; because it is not the sort of petition contemplated by the rule laid down in the cases from *Brockett* v. *Brockett,* 2 How. 238, to *Morse* v. *United States,* 270 U. S. 151. See footnote 6 on page 11, *supra.* That rule was adopted in order to prevent the anomaly and avoid the possible friction which might arise if a decision of a lower court were being reconsidered and reviewed by the lower and superior courts simultaneously. See *Chicago, G. W. R. R. Co.* v. *Basham,* 249 U. S. 164, 167. Hence the rule applies only to a genuine petition for rehearing (cf. *Federal Equity Rule 69*), which seeks a reconsideration of the issues in controversy between the parties which might be contested on appeal, and does not apply to a document which seeks merely a clarifying or formal amendment as to a point not in issue between the parties. *Larkin Packer Co.* v. *Hinderliter,* 60 F. (2d) 491 (C. C. A. 10th), cf. *Long* v. *Maxwell,* 59 Fed. 948, 950 (C. C. A. 4th); *Federal Equity Rule 72.*

In the *Larkin Packer Co.* case, the trial court, in its decree adjudging that a patent claim was valid and infringed, erroneously referred to a particular exhibit, Exhibit J, as being the infringing device.

An application was made to the trial court to correct its decree by striking out reference to Exhibit J. This petition was granted, but it was held that the time for appeal ran from the original decree, not from the granting of the application to make a correction. McDermott, C. J., said at page 493:

> In the case at bar an informal application to correct the court's findings and conclusions was seasonably made. The court considered the application and granted it. But we think the application cannot be treated as a petition for rehearing. No rehearing of the issues was prayed for. All that was done was to direct the trial court's attention to an "error arising from an accidental slip or omission", which the court had power to correct without rehearing. Equity Rule 72 (28 USCA § 723); Foster's Fed. Prac. §§ 444, 445. The court originally held that Exhibit 3, with the ears removed, infringed. That holding was not changed. All the court did was to eliminate the words "Defendant's Exhibit J" which were used parenthetically to identify the modified device in the record. As far as the record discloses, this was all it was asked to do. Calling the court's attention to such an accidental slip is commendable; but it cannot fairly be called a petition for rehearing.

This reasoning applies to the instant case inasmuch as Mrs. Zimmern's so-called petition for rehearing did not pray for a rehearing of the issues, but merely directed the trial court's attention to an

error arising from an accidental slip which the court had power to correct without hearing.[10]

Furthermore, the so-called petition for rehearing failed to toll the statute because it does not appear that counsel took the steps[11] necessary to give the Government notice of the petition. *Giant Powder Co.* v. *California Vigorit Powder Co. et al.*, 5 Fed. 197, 199, 201–202 (C. C. D. Calif.) (per Field, Circuit Justice). And, finally, even if it did toll the statute for Mrs. Zimmern, it did not enlarge the time for appeal by the other respondents.[12]

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[10] It is doubtful whether petitioners' counsel originally viewed Mrs. Zimmern's document as a petition for rehearing. A cursory inspection of that document (R. 84–86) and a comparison of it with genuine petitions for rehearing filed in this very case (R. 58–60; R. 81–83), makes it clear that it more nearly resembles a memorandum of authorities than a succinct statement of the points as to which a rehearing is desired. Cf. *Public Schools* v. *Walker*, 9 Wall. 603, 604; *Merchant and Miners Transp. Co.* v. *Robinson etc. T. & T. Co.*, 194 Fed. 361 (C. C. A. 1st); *The Governor Ames*, 187 Fed. 40, 50–51 (C. C. A. 1st). Indeed the so-called petition for rehearing on its own face states that it is merely a "petition to clarify the construction of the decree" (R. 86, line 3).

[11] Although the point is not free from doubt, it seems that under the rules (printed in the Appendix) of the United States District Court for the Southern District of Alabama, one who petitions for rehearing is required to take steps which will ensure that the other side will have notice. That is, the petitioner must file his application with the clerk, *General Rule 30*, and the clerk must then give notice to counsel of record, *General Rule 12*.

[12] The Circuit Court of Appeals in this case held that a petition for rehearing tolls the appeal statute for the benefit only of the person who makes it (R. 80, lines 16–18). Although we have not been able to find any other authority which directly supports or refutes this proposition, it seems

II

The Amended Petition for Rehearing Filed by Samuel Zimmern Did Not Revive the Already Expired Right to Appeal From the Decree of March 3, 1934

To show that the appeal time was extended, petitioners also rely upon the Amended Petition for Rehearing filed by Samuel Zimmern.[13] This petition was not filed until August 13, 1934 (R. 58–60). Although the filing was during the term of the District Court (R. 57), it was more than three months after the entry of the decree of March 3, 1934 (R. 54–57).

The petition, therefore, could not extend or enlarge the appeal time. And it did not revive it.

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consistent with the rule laid down in *Sage et al.* v. *Central R. R. Co.*, 93 U. S. 412, 418–419, that where an amicus curiae petitions for rehearing, his petition does not toll the appeal statute. Indeed it may be that a petition for rehearing which is not joined in by all the parties does not operate to give even the moving party a stay of the effective date of the decree unless he gets a severance. Cf. *Hartford Accident & Indemnity Co.* v. *Bunn*, 285 U. S. 169.

[13] In their Supplemental Brief, p. 2, the petitioners for the first time refer to an "*original* petition" of Samuel Zimmern. Without repeating in detail our argument under Point I, *supra*, it will be sufficient to say that this "original petition", if it existed and could be supported by affidavit, cannot enlarge the appeal time either for Samuel Zimmern or other parties (see footnote 12, *supra*) because it is not in the record (cf. pages 11–12, *supra*), and because its existence cannot be presumed from anything in the record (cf. pages 12–15, *supra*). Moreover, a point based on this original petition cannot be considered in this Court because it was not made in the court below or in the petition for certiorari. *Clark* v. *Williard*, 294 U. S. 211, 216.

A petition for rehearing filed more than three months after entry of a final decree (even if filed within the term) does not have the effect of lifting the bar of Section 8 (c) of the Act of February 13, 1925, which had already fallen and had shut off the right of appeal. *Conboy* v. *First National Bank,* 203 U. S. 141, 145 (petition for rehearing in bankruptcy); *Brady* v. *Bernard and Kittinger,* 217 U. S. 595 (petition for rehearing in bankruptcy); *United States* v. *East,* 80 F. (2d) 134 (C. C. A. 8th) (petition for rehearing in bankruptcy). *McIntosh* v. *United States; Gilliam* v. *United States,* 70 F. (2d) 507 (C. C. A. 4th), certioraris denied, 293 U. S. 586, 587, petition for rehearing denied, 293 U. S. 631 (petition for rehearing in equity); *Northwestern Public Service Co.* v. *Pfeifer,* 36 F. (2d) 5 (C. C. A. 8th) (motion for new trial at law); *Chicago M. & St. P. Ry. Co.* v. *Leverentz,* 19 F. (2d) 915 (C. C. A. 8th), certiorari denied, 275 U. S. 543 (motion for new trial at law). As Chief Justice Fuller said in the first of these cases (page 145):

> The right of appeal had then been lost and appellant could not reinvest himself with that right by filing a petition for rehearing.

III

The Addition Made to the Final Decree by the District Court's Order of August 13, 1934, Did Not Revive the Already Expired Right to Appeal From the Final Decree Itself

The petitioners' third contention is that the addition made to the final decree by the District Court's

order of August 13, 1934 (R. 60–61) revived the lost opportunity for appealing from the final decree itself (R. 54–57)..

Before answering in detail this contention, it will be helpful to look at the record to see exactly what is the scope of the final decree and the scope of the amending order. The final decree, in eight numbered paragraphs, which occupy four pages of the record (R. 54–57), adjudged that (1) Samuel Zimmern is indebted to the United States for certain named sums; (2) Samuel Zimmern's conveyance of the Government Street property is set aside; (3) the joint conveyance by Samuel Zimmern and his wife of the Royal Street property is set aside; (4) "the two above described parcels of land * * * be sold by the United States Marshal" at public sale; (5) out of the proceeds of the sale of the Government Street property $2,000 be paid to Leila Zimmern in lieu of homestead exemptions; (6) subject to the $2,000 homestead claim, a trust be declared on the proceeds in favor of the United States for the amount of its tax claim; (7) in the event the proceeds are insufficient to meet the tax claim, execution issue against Samuel Zimmern's other property; and (8) in the event Samuel Zimmern's wife and children fail to note in the county record book that their deeds have been cancelled, the Clerk of the District Court shall so note.

The amending order consists of a clarifying provision four lines long (R. 61) which reads as follows:

> 9. It is further ordered and decreed that the lands and appurtenances thereto mentioned and described and ordered to be sold by this decree be sold subject to any dower rights of the respondent Leila Zimmern.

The precise contention of the petitioners is that this amendment gave a new opportunity for appealing from the final decree itself, although the original appeal time had already elapsed and, therefore, could not, strictly speaking, be "extended" or "enlarged."

The petitioners do not seek a review of the amendment itself. It is true that their appeals attempted to embrace both the final decree and the amending order (R. 61, 65, 67–68); but they had no right to appeal from the amending order since it did not harm them (*Lindheimer* v. *Illinois Bell Telephone Co.*, 292 U. S., 151, 176), and in fact they have not assigned error to that order (R. 62–64, 65–67; 68–70).

Although now the petitioners make some slight suggestion that they were prejudiced by the amendment (petition for certiorari, p. 17), the suggestion is without foundation. The amendment benefited Mrs. Leila Zimmern since it preserved her inchoate dower interest against any possible extinguishment. And it did not harm Mr. Zimmern. He never claimed, and no one could properly contend, that Mr. Zimmern was entitled to have his wife's property sold to pay his debts.

The petitioners do not contend that the amendment dealt with any matter in controversy. Nor could they successfully make that contention. Mrs. Zimmern's inchoate dower was not an issue raised by the bill of complaint, the answer, the evidence or the opinion. See footnote 1 on page 3, and footnote 3 on page 4. And the Government has never supposed that it was entitled to reach Mrs. Zimmern's inchoate dower interest to pay Mr. Zimmern's taxes.

But the petitioners say that the decree was changed and this formal change, which was made two months after the appeal time had expired, which benefited Mrs. Zimmern, and which in no way affected the other petitioners, gave a fresh right of appeal.

The very face of the record shows how slight the change was. The court did not set aside the earlier decree covering four pages (R. 54–57) and replace it with an equally long and equally objectionable decree. Cf. *United States* v. *Gomez,* 1 Wall, 690, 700; *Union Guardian Trust Co.* v. *Jastromb,* 47 F. (2d) 689 (C. C. A. 6th). It merely added four lines (R. 61). And these lines, as the next paragraph points out, were of very minor consequence.

Before those four lines were added it is *conceivable* that a United States marshal, by giving a broad construction to paragraph 4 of the original decree (R. 56) might have prepared the terms of sale so as to offer at public outcry not merely the

fee interest of Samuel Zimmern in both the Government Street and Royal Street properties, but also the inchoate dower interest of Leila Zimmern in the Royal Street property.[14] But if the marshal brought this new element into the case, Mrs. Leila Zimmern would have been free to request the court to enter a decretal order fixing more specifically the precise terms of sale. Cf. *Long* v. *Maxwell,* 59 Fed. 948, 950–951 (C. C. A. 4th) (per Fuller, Circuit Justice). Or she could even have waited until the time for confirming the sale (R. 56, lines 15–16) to raise the point as to whether her inchoate dower interest was properly included; and, good cause having been shown, the District Court undoubtedly would not have confirmed the sale. Cf. *Blossom* v. *Railroad Co.* 3 Wall. 196, 207; *Graffam* v. *Burgess,* 117 U. S. 180, 192. The fact that instead of following either of these customary procedures, she chose to ask for a clarifying amendment, does not give to her or other parties a new right to appeal from the decree itself.

There is no doctrine that any minor amendment to a decree automatically revives an expired right to appeal from an original decree. Although on this point there seems to be no authority either way

[14] Leila Zimmern has no inchoate dower in the Government Street property. Prior to the final decree in the District Court, she had conveyed, as she is permitted to do by Section 7433 of the Code of Alabama (1923), her interest in the Government Street property to the First National Bank of Mobile, Alabama (R. 19; R. 37, line 17).

in this Court, the decisions of the Circuit Courts of Appeals agree that where an amendment makes merely a formal clarification of an undisputed point, it does not give a new right to appeal from the original decree.[15] *Better Packages, Inc.* v. *L. Link and Co.*, 74 F. (2d) 679 (C. C. A. 2d), certiorari denied, 295 U. S. 751; *Stradford* v. *Wagner*, 64 F. (2d) 749 (C. C. A. 10th); cf. *Larkin Packer Co.* v. *Hinderliter Tool Co.* 60 F. (2d) 491, 494 (C. C. A. 10th). And the prevailing view in the state

[15] Compare the rule that, since it does not affect the issues in suit, an amendment to the decree which taxes costs does not extend the appeal time. *Fowler* v. *Hamill*, 139 U. S. 549; *United States* v. *Nordbye*, 75 F. (2d) 744, 746 (C. C. A. 8th); *The Albatross*, 19 F. (2d) 141 (C. C. A. 3d); *The Washington*, 16 F. (2d) 206, 209 (C. C. A. 2d); *Allis-Chalmers Co.* v. *United States*, 162 Fed. 679 (C. C. A. 7th); *Prescott & A. C. Ry. Co.* v. *Atchison, T. & S. F. R. Co. et al.*, 84 Fed. 213 (C. C. A. 2d); *Crowell et al* v. *United States*, 281 Fed. 835 (D. Mass.). Compare also the rule that a decretal order giving further directions as to a matter covered by a prior order does not extend the time for appealing from the prior order. *Hill* v. *Chicago & Evanston Railroad Co.*, 140 U. S. 52; *Sage* v. *Railroad Co.* 96 U. S. 712, 714; *Long* v. *Maxwell*, 59 Fed. 948 (C. C. A. 4th); *Baxter* v. *Bevil Phillips & Co.*, 219 Fed. 309 (S. D. Ala.); *Beaven* v. *Countess of Mornington*, 8 H. L. C. 525; 11 Eng. Rep. 534. And compare the rule that a court has the power to vary in minor respects the provisions of a decree of sale, even after the term at which the decree was entered has expired. *Fulton Inv. Co.* v. *Dorsey*, 220 Fed. 298 (C. C. A. 8th); *Mootry* v. *Grayson*, 104 Fed. 613 (C. C. A. 9th).

courts seems to be the same,[16] though there may be some cases to the contrary.[17]

Of the Federal cases cited, two are particularly relevant. In *Better Packages, Inc.* v. *L. Link & Co.*, 74 F. (2d) 679, 680–681 (C. C. A. 2d) the original decree had enjoined infringement not only of a valid patent claim, but also of an invalid claim which was not being pressed by the patentee. The District Court, upon the infringer's suggestion, made an amendment striking from its decree all reference

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[16] There are a number of state cases which indicate that the time to appeal runs from the date of an original decree and not from purely formal amendments thereto. This principle has found application in cases where the amendment struck out superfluous provisions, *Hall* v. *Brown*, 139 App. Div. 388, 124 N. Y. Supp. 52 (3d Dept.); where the amendment favored the appellant by removing from the original judgment sums which the appellant otherwise would have been required to pay, *Chenoweth* v. *Chenoweth*, 64 Indiana App. 260, 114 N. E. 988, or to which the appellant's claim would otherwise have been subject, *Fidelity Philadelphia Trust Co.* v. *Brown*, 181 Minn. 466, 233 N. W. 10; *Savings and Loan Society* v. *Horton*, 63 Cal. 310; where the amendment made the decree conform to the exact language of the opinion, *Cody* v. *Cody*, 47 Utah, 456, 154 Pac. 952; where the amendment made the judgment correspond with the verdict, *Alabama Coal and Navigation Co.* v. *State*, 54 Ala. 36; and where the amendment corrected the original order of judgment so that proper parties were named, *Schulze* v. *Oregon R. R. and Nav. Co.*, 41 Wash. 614, 84 Pac. 587; *Besser* v. *Alpena Circuit Judge*, 155 Mich. 631, 119 N. W. 902.

[17] Many of the state cases upon which the petitioners rely to establish a contrary rule are distinguishable. *In the Matter of Potter*, 141 Cal. 350, 74 Pac. 986, held that an amendment to tax costs extends the appeal time. This decision is contrary to the uniform current of Federal decisions, see note 15 on page 28, *supra*, and so has no great weight in this

to the invalid claim. It was held that the time to appeal ran from the date the original decree was entered, and not from the later date on which it was amended.

Court. In *Hayes* v. *Silver Creek Co.*, 136 Cal. 238, 68 Pac. 704, the nature of the amendment is not disclosed in the report, and it is impossible to know how vitally it affected the original decree. *Spencer* v. *Troutt*, 133 Cal. 605, 65 Pac. 1083, involved a serious amendment because it added to the decree the name of the very person who sought to appeal. Obviously he could not have appealed before the amendment as he was not aggrieved until it was made. In *Johnson* v. *Foreman*, 24 Ind. App. 93, 56 N. E. 254, the objection was not to the original decree but *to the amendment itself*. The time for appealing from the amendment, of course, runs from the time it was entered, not from some earlier date. *Billson* v. *Lardner*, 67 Minn. 35, 69 N. W. 477, presented a case in which the trial court, by a so-called amendment, made completely new findings. That, of course, was a radical change in the decree. The Texas Court of Civil Appeals held in *Hall* v. *Read*, 28 Tex. Civ. App. 18, 66 S. W. 809 (contrary to the decision in Indiana cited in footnote 16) that a change in the number of dollars to be paid the appellant was a vital amendment tolling the appeal statute. In *Partridge* v. *Wooton*, 63 Tex. Civ. App. 280, 137, S. W. 412, it was not possible to appeal from the original decree; but appeal became possible when the amendment was made. Naturally the appeal period did not begin until the amendment was made. In *Henry* v. *Boulter*, 26 Tex. Civ. App. 387, 63 S. W. 1056, it appeared that an order had been orally made on November 19, 1896, but not entered until four or five years later. It was held that the time for appeal ran from the time the order was actually entered. *Vincent* v. *Vincent*, 3 Mackay (14 Dist. of Col.) 320, merely held that an appeal taken while the trial court was considering a petition for rehearing should be dismissed as prematurely taken, especially since it appeared that the petition for rehearing was successful in procuring an amendment as to one of the matters included in the appeal.

In *Stradford* v. *Wagner*, 64 F. (2d) 749 (C. C. A. 10th) Stradford, claiming to be the equitable owner of property, brought a bill in equity to have cancelled a mortgage on that property held by a Savings and Loan Association. The Association brought a cross-bill to foreclose the mortgage. On May 22, 1931, the District Court entered a decree (1) ordering a foreclosure sale, (2) directing that the proceeds be brought into court, and (3) barring Stradford from all right and title to the property and, presumably, the proceeds. On December 22, 1931, Stradford filed a petition for rehearing asking that the foreclosure be set aside. On February 27, 1932, the District Court entered an order "that the decree should not be set aside, but modified to the effect that the master's sale of the property should be free of all claims of plaintiff (Stradford) without prejudice to his assertion of his right to proceeds" (page 751). Thereupon Stradford sought an appeal from the order as modified. It was held that the appeal was too late since the time ran from the date on which the original decree was entered. The court said at page 751:

> Appellant urges, in a petition for rehearing, that where a chancellor seasonably and substantially modifies a decree in equity, time for appeal runs from the entry of the modified decree. That may be conceded. But appellant's complaint is not directed at the so-called modification, but at the original

decree ordering a sale, which was not modified.

The decree of foreclosure was entered in May, 1931, and time for appeal expired in August, 1931. In December, a petition for rehearing was filed. That petition was denied, and an order entered which did not alter or modify the decree of foreclosure, but simply permitted appellant to assert any claim he might have against the proceeds. Appellant has not, and does not, complain of the permission so accorded him; his complaint has been, and is, that the court erred in ordering a sale of the property in May. The effort is therefore to appeal from the 1931 decree long after it became final—an attempt to do indirectly that which cannot be done directly.

The instant case falls well within these authorities. The petitioners applied for appeals from a decree of the District Court five and one-half months after it was entered and two and one-half months after the appeal time had expired. And they offer as an excuse for their delay an amendment made at their request, and to benefit them, after the regular appeal time had expired, and as to a minor formal matter which could, at their option, have been remedied in another way than by an amendment to the decree. It is submitted that the excuse is insufficient, and that the amendment did not revive a right to appeal which had expired months before the amendment was made.

CONCLUSION

We respectfully submit that the order of the court below dismissing the appeals because they were not timely taken was correct and therefore should be affirmed.

STANLEY REED,
Solicitor General.
ROBERT H. JACKSON,
Assistant Attorney General.
CHARLES E. WYZANSKI, JR.,
SEWALL KEY,
S. E. BLACKHAM,
Special Assistants to the Attorney General.

MARCH 1936.

APPENDIX

Federal Equity Rules

RULE 69

Petition for Rehearing

Every petition for a rehearing shall contain the special matter or cause on which such rehearing is applied for, shall be signed by counsel, and the facts therein stated, if not apparent on the record, shall be verified by the oath of the party or by some other person. No rehearing shall be granted after the term at which the final decree of the court shall have been entered and recorded, if an appeal lies to the circuit court of appeals or the Supreme Court. But if no appeal lies, the petition may be admitted at any time before the end of the next term of the court, in the discretion of the court.

RULE 72

Correction of Clerical Mistakes in Orders and Decrees

Clerical mistakes in decrees or decretal orders, or errors arising from any accidental slip or omission, may, at any time before the close of the term at which final decree is rendered, be corrected by order of the court or a judge thereof, upon petition, without the form or expense of a rehearing.

Rules of the United States District Court for the Southern District of Alabama Adopted September 1, 1928

GENERAL RULE 12

Motions.—Any motion, in any cause pending in this court, may be brought before the court at any

time designated by the judge, whether in vacation or in term time.

The first and third Mondays of each month shall be motion or rule day in common law, equity, and admiralty cases. The clerk shall, from time to time, set for hearing on the then next following rule day, motions and other questions arising upon the pleadings or otherwise and not involving any trial of issues of fact, and shall give to counsel of record in each case so set, notice thereof, by telephone or otherwise; but in no instance shall a case be set for any rule day less than three days in advance of such rule day.

GENERAL RULE 30

Applications in chambers.—All applications made to the judge at chambers or in vacation, for any order in any case, must be in writing; and all orders made thereon must be in writing. Such applications must be filed in the clerk's office.

UNITED STATES OF AMERICA,*
Southern Division, Southern District of Alabama.

PERSONALLY appeared before me, the undersigned, a Notary Public in and for the State of Alabama and County of Mobile, ROBERT T. ERVIN, who is known to me and who upon being by me first duly sworn doth depose and say that he is a United States District Judge for the Southern District of Alabama; that as such Judge he presided as trial Judge at the hearing of that certain equity cause, No. 132, in the District Court for the Southern District of Alabama, filed by the United

*The original affidavit, of which this is a copy, has been filed with the Clerk of the Supreme Court of the United States.

States of America on October 15, 1929, entitled United States of America v. Samuel Zimmern, Leila Zimmern, Samuel Joseph Zimmern, Jr., Bernice L. Levinsohn and Janice Zimmern; that as Judge in said cause he signed all decrees and all orders of record in said cause in the United States District Court, Southern District of Alabama; that he has examined a copy of "Exhibit A" attached by the appellants to the appellants' petition for rehearing in the Circuit Court of Appeals for the Fifth Circuit, and that in order to identify "Exhibit A" to which affiant refers, he attaches to this affidavit a copy of said "Exhibit A" of appellants. Affiant further says that the original of the paper marked "Exhibit A", a copy of which was appended by the appellants to their petition for rehearing in the Circuit Court of Appeals, Fifth Circuit, has never been filed with him, either by the appellants or by Harry T. Smith, or by any other person.

Affiant says that on an occasion subsequent to the rendering of the decree of March 3, 1934 in said cause, Harry T. Smith, Esq., who was then one of the solicitors in said cause, on behalf of appellant, Leila Zimmern (Mrs. Samuel Zimmern), came to the office of affiant in connection with this case. On that occasion Mr. Smith had a paper in his hand which he stated to affiant was a petition to amend the decree of March 3, 1934, in order to exclude from sale the dower interest claimed by Mrs. Leila Zimmern. Affiant did not see the paper which Mr. Smith had with him nor was the paper left with affiant, who assumes that it was the original of which "Exhibit A" is a copy. After Mr. Smith verbally presented his views with reference to the

protecting of Mrs. Zimmern's dower interest, affiant expressed himself in agreement and stated that he saw no reason why there should be any difficulty with reference to amending the decree in that particular but suggested that Mr. Smith see Hon. Alex Birch, who was then United States Attorney; and that Mr. Smith then left the office of the affiant, stating that he would call on Mr. Birch. The paper which Mr. Smith brought to the office of affiant was not left with the affiant nor exhibited to the affiant nor did he read it. Affiant is unable to determine the exact or approximate date of the conversation referred to, but later, and on August 13, 1934, the decree of March 3, 1934, was amended by the addition of a paragraph expressly providing that the sale of property should be subject to the dower interest claimed by Mrs. Zimmern. Affiant further says that in said cause no motion or petition for rehearing has ever been filed with him either by the appellants themselves, by Harry T. Smith, Esq., or by any other person, and that the only petition for a rehearing ever filed, to the knowledge of affiant, is the petition for rehearing filed on August 11, 1934.

Subscribed and sworn to before me this 23rd day of March, 1936.

[SEAL]

ROBERT T. ERVIN.
ANITA GUICE,
Notary Public, Mobile County, Ala.

EXHIBIT "A"

In the United States District Court for the Southern District of Alabama

In Equity. No. 132

UNITED STATES OF AMERICA, COMPLAINANT

v.

SAMUEL ZIMMERN, ET AL., DEFENDANTS

PETITION FOR REHEARING

Ordinarily a decree for the sale of land belonging to one of the defendants, needs no qualification as to the title which is to be sold, as it could not be binding on any person owning an interest in the land who is not a party to the case. When, however, a decree of sale condemns and orders the sale of certain property, without specifying whose interest in the property is to be sold, it purports to operate as a sale of the interest of all of the defendants in the cause. For instance, the decree in this case, which orders the property to be sold as a whole without any reference whatever to the question as to whose title it is that is condemned, would include a sale, not only of the interest which is vested in the debtor, Samuel Zimmern, but also the dower interest which is vested in Mrs. Leila Zimmern, who is not indebted to the United States Government and whose dower interest in the property is not subject to sale under execution against her husband, Samuel Zimmern, and which dower interest could not be made subject to the payment of Mr. Zimmern's debts by setting aside and can-

celling the deeds conveying to her and to her children the interest of her husband which was subject to execution for his debts. The several conveyances which were executed by Samuel Zimmern to his wife and children, respectively, having been declared to be void and having been set aside and cancelled, the title to this property stood, of course, precisely as if no such conveyances had been executed, that is to say, the title which is vested in Samuel Zimmern is subject to the dower rights of Mrs. Zimmern, and this dower right cannot be sold for the payment of her husband's debts. The authorities to this effect are gathered in the 19th Corpus Juris, page 519, where it is said:

> Where the lien of the execution under which the lands of a husband were levied upon and sold antedated the marriage, the wife's dower right is thereby divested. But if the wife's dower had attached at the time the lien arose, her right to dower is not impaired thereby in the absence of special statute changing the rule, and the purchaser at the execution sale acquires no greater or better title, so far as such right is concerned, than could have been vested in him by the voluntary conveyance of the husband at the date of the inception of the lien.

There are a great many authorities cited in Note 83 on page 520 in 19 C. J., to the same effect, including—

> *Callahan* v. *Nelson,* 128 Ala., 671.
> *Wood* v. *Morgan,* 56 Ala., 397.
> *Nance* v. *Hooper,* 11 Ala., 552.

The reason for the distinction to which we have referred between cases where the wife is not a

party, so that a decree of sale could not possibly be construed as intended to include her dower interest, on the one part, and cases where the wife is a party and the terms of the decree are broad enough to cover the entire interest in the property sold, is pointed out in the 19th Corpus Juris, page 519.

Of course, the question as to whether the decree is to be construed as intending to order the sale of the entire interest or only the interest of the debtor (husband) in the property, or in other words, whether the decree intends to subject the dower interest vested in the wife or not, is a matter of construction, but we are afraid that the language of the decree, as rendered, is broad enough to cover all interests in the property, and if such a construction should be placed upon it, then Mrs. Zimmern, being a party to the case, would be bound by the decree, howsoever erroneous it might be in this particular, and her only remedy is by this petition to clarify the construction of the decree in this particular or by appeal. We are quite well assured that it was not the intention of the Court to condemn Mrs. Zimmern's dower interest in this property, which was not subject to this debt, and we are, therefore, petitioning for a modification of the decree in this respect.

We do not imagine that the Court had any purpose to so order. Our thought is that in drawing this decree, the Court intended only to condemn the interest in the property which was owned by the debtor (husband) and simply overlooked the fact that as Mrs. Zimmern was a party defendant, it was necessary to specify in the decree that it was the interest of the husband that was to be con-

demned and sold and not the interest of the wife, who was in no wise indebted and whose dower right could not be subjected to the payment of her husband's debts.

For these reasons, we respectfully apply, on behalf of Mrs. Samuel Zimmern, for a rehearing, to the extent of modifying the decree of sale so as to refer exclusively to her husband's interest in this property and not to include her dower interest.

Respectfully submitted.

HARRY T. SMITH & CAFFEY.

In the District Court of the United States for the Southern District of Alabama—Southern Division*

In Equity, No. 132

UNITED STATES OF AMERICA, COMPLAINANT

v.

SAMUEL ZIMMERN ET AL., RESPONDENTS

I, Virgil C. Griffin, Clerk of the United States District Court in and for the Southern District of Alabama, do hereby certify that no motion or petition for rehearing or for a new trial was filed in the above entitled cause between the rendition of the final decree therein on the 3d day of March, 1934, and the 11th day of August, 1934, and that the only motion for rehearing at any time filed in said cause was filed on the 11th day of August, 1934, and is set out on pages 72–74 of the record of this cause which has been transmitted to the United

* The original affidavit, of which this is a copy, has been filed with the Clerk of the Supreme Court of the United States.

States Circuit Court of Appeals for the Fifth Circuit, all as shown by the records of said court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Mobile, Alabama, this 22nd day of October, 1935.

[SEAL OF COURT] [s] VIRGIL C. GRIFFIN
Clerk.

By ——— ———
Deputy Clerk.

U. S. GOVERNMENT PRINTING OFFICE: 1936